SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-005573 06/07/2006

CLERK OF THE COURT
HONORABLE PAUL J. MCMURDIE C.I. Miller
Deputy

FILED: 06/09/2006

SANDRA K JONES RICHARD L KLAUER

v.

GENE PAULINE GILMAN JAMES R HARRISON

RULING MINUTE ENTRY

The court has received and considered Defendant's motion for summary judgment, response, reply and oral argument of counsel and the court sets forth its findings and rulings as follows:

In ruling on the motion for summary judgment, the court has followed the directions of the Arizona Supreme Court. In *Orme School v. Reeves*, 166 Ariz. 301 (1990), the Arizona Supreme Court held that although a trial judge must evaluate the evidence to some extent in ruling on a motion for summary judgment, the trial judge is to apply the same standards as used for a directed verdict. Either motion should be granted only if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. 166 Ariz. at 309. Thus, a trial judge should grant summary judgment if, on the state of the record, he would have to grant a motion for directed verdict at the trial.

However, the court also noted in *Orme School* that their opinion did not alter the traditional rule that although courts have no discretion to grant summary judgment if the standard is not met, "they can deny summary judgment even where there is apparently no genuine dispute over any material fact." 166 Ariz. at 309, fn. 11.

The court in *Orme School* concluded by agreeing with the United States Supreme Court regarding a similar holding regarding summary judgments in federal courts.

> Our holding . . . does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge, whether he is ruling on a motion for summary judgment or for directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial court should act other than with caution in granting summary judgment or that the trial judge may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Orme School, 166 Ariz. at 309-10 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The *Orme School* court reminded trial courts "that summary judgment should not be used as a substitute for jury trials simply because the trial judge may believe the moving party *will* probably win the jury's verdict, nor even when the trial judge believes the moving party *should* win the jury's verdict." 166 Ariz. at 310.

Plaintiff initiated enforcement of an installment contract for the transfer of real property against the Defendant. Defendant moved for summary judgment. Plaintiff, in response to the Defendant's motion for summary judgment, contends that there is an ambiguity present in the contract for the transfer of real property and thus there is a genuine issue of material fact for trial. (Response at 5.)

Generally speaking, matters of contract interpretation are left to the jury and thus summary judgment is inappropriate when dealing with such matters. *Miller Cattle Co. v. Francis*, 35 Ariz. 535, 541 (1929). In the case at bar, however, Plaintiff, through her statements given during deposition, admitted that she expected to pay a specific figure each month for the term of the contract. (Dep. 1/12/2006, at 27, lines 23-25; 28, lines 1-2.) Given the admission by Plaintiff, there is no longer an ambiguity regarding the material price term. Instead, the issue becomes one of material breach. Arizona jurisprudence dictates that a contract for the purchase of real property is terminated when the purchasing party fails to perform by the agreed upon deadline. *Allan v. Martin*, 117 Ariz. 591, 593 (1978).

FINDINGS OF FACTS

Plaintiff and Defendant entered into a contract on October 28, 1992 for the transfer of real property located at 6832 E. Loma Land Dr. (Motion for Summary Judgment, Ex. A.) The 1992 agreement made no reference to any past payments made by Plaintiff. *Id*. Furthermore, Plaintiff admits that there is no connection to any payments made prior to the formation of the contract. (Dep. 1/12/2006, at 19, lines 19-21.) This admission is supported by the contract itself, which expressly states that the agreement acts retroactively to January 1, 1992 and no further. (Motion for Summary Judgment, Ex. A.) Thus any payments made prior to January 1, 1992 are not part of the contract for the transfer of the Defendant's real property to the Plaintiff. *Id*.

The contract ambiguously states that Plaintiff is required to pay Defendant "the amount of the mortgage paid by the Gilmans with no interest." (Motion for Summary Judgment, Ex. A). It is thus unclear by the language of the contract itself how much Plaintiff was obligated to pay Defendant.

Plaintiff claims that at the time of the signing of the contract she was unaware of how much she was going to owe under the agreement. (Dep. 1/12/2006, at 25, lines 6-15.) However, Plaintiff admits that she later consulted Jack Senini (a real estate agent) to help her define her financial obligations to Defendant. (Dep. 1/12/2006, at pg. 27, lines 23-25.) After her consultation with Senini, Plaintiff recognizes that it was her understanding that she was to pay $300.00 per month to Defendant in order to satisfy the terms of the installment contract. (Dep. 1/12/2006, at pg. 28, lines 1-2.) Plaintiff further recognizes that she was obligated to pay a total of $3,600.00 per year to Defendant under the contract. (Dep. 1/12/2006, at 30-31, lines 24 through 1.) Thus during the course of the eleven year payment term, Plaintiff was obligated to pay 39,600.00 in total to Defendant. (Motion for Summary Judgment, Ex. A.)

Despite this obligation, Plaintiff paid a total sum of $15,280 to Defendant. (Motion for Summary Judgment, Ex. E.) In both 1997 and 2002, Plaintiff failed to make a single payment to Defendant. (Dep. 1/12/2006, at 42, lines 23-25; p. 43, lines 10-15.) When Plaintiff's payment history is viewed in its totality, it becomes apparent that Plaintiff has fallen well short of meeting her financial obligations to Defendant. (Dep. 1/12/2006, at 28, lines 1-2.)

Even if the court were to ignore Plaintiff's statements regarding her financial obligations under the contract, it is still apparent that Plaintiff has failed to meet the requirements under the contract. Defendant was originally required to pay a total of $26,877.60 on the Mortgage note. (Plaintiff's Supplemental Statement Facts ¶ 5.) This figure of $26,877.60 represents the total value of Defendant's original financial obligation to the lender. *Id*. It thus follows that even if the price term provided by the real estate agent is discounted (Dep. 1/12/2006, at 28, lines 1-2,) Plaintiff was still required to pay a minimum of $26,877.60 under the language of the contract. (Motion for Summary Judgment, Ex. A.) When the payment period specified by the contract expired on December 31, 2002, Plaintiff had only paid $15,280 to Defendant. (Motion for Summary Judgment, Ex. E.)

The Law

Plaintiff materially breached her contractual obligations to Defendant under the terms of the contract for transfer of real property as Plaintiff has failed to make the requisite payments under the agreement.

Plaintiff failed to adhere to the terms of the contract for the transfer of the property and is thus in material breach of contract. When a party to the contract for the purchase of real property fails to tender performance by the agreed-upon deadline, that party is in breach. *See Allan v.*

Martin, 117 Ariz. 591, 593 (1978) (holding that when the deadline for performance is material to a contract and one party fails to perform by that deadline, then the other party may treat the contract as terminated). The non-performance by one party of a material term of a contract "operates as the non-occurrence of a condition." RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. a, (1981). The non-occurrence of a condition to the contract may either suspend performance by the non-breaching party or discharge that party's performance obligations completely. *Id*. Under Arizona law, a deadline term under a contract for the transfer of real property is material. *See Allan*, 117 Ariz. at 593; *Dalton v. McLaughlin*, 130 Ariz. 270, 274 (App., 1981) (holding that since performance was not tendered within the agreed upon time period, the non-breaching party had the right to consider the contract at an end and any remaining duty was thus discharged). When the agreed-upon performance is not tendered by the date specified in the contract, there is a material breach and non-breaching party may have its performance excused. *Dalton v. McLaughlin*, 130 Ariz. at 274.

Plaintiff paid only a fraction of the total sum agreed upon by the contracting parties (Dep. 1/12/2006, at 28, lines 1-2; Plaintiff's Supplemental Statement Facts ¶ 5). There is no material dispute that Plaintiff has fallen well short of her financial obligation under the contract. (Motion for Summary Judgment, Ex. E.) The non-occurrence of the condition to pay the admitted sum by the agreed-upon date of December 31, 2002 discharges Defendant's obligation to perform on the remainder of the contract. RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. A; *Allan*, 117 Ariz. at 593. It follows that given Plaintiff's material breach, Defendant is not required to transfer the real property. In light of the facts admitted by Plaintiff, summary judgment is appropriate for the Defendant as Plaintiff has failed to create a genuine issue of material fact that would merit trial. *See Orme School v. Reeves*, 166 Ariz. at 309.

Defendant is not unjustly enriched as Plaintiff was able to reside within the Defendant's residence during the contract period in question.

Plaintiff argues that to grant summary judgment in favor of Defendant would create unjust enrichment. The court disagrees. Plaintiff is not entitled to restitution as Plaintiff was able to reside at the property in question during the payment period listed in the contract. Restitution is due only when one party "has been unjustly enriched at the expense of another." RESTATEMENT (FIRST) OF RESTITUTION § 1, (1937). A party is unjustly enriched when the retention of a received benefit would be unjust. RESTATEMENT (FIRST) OF RESTITUTION § 1, cmt. a. Benefit is defined as any form of received advantage. RESTATEMENT (FIRST) OF RESTITUTION § 1, cmt. b. Even when one party has received a benefit from another, that party is only obligated to pay restitution when it would be unjust for that party to retain the benefit without compensation. RESTATEMENT (FIRST) OF RESTITUTION § 1, cmt. c. Also, a party who "officiously confers a benefit upon another is not entitled to restitution." RESTATEMENT (FIRST) OF RESTITUTION § 2, (1937).

RESTATEMENT (SECOND) OF CONTRACTS § 374 cmt. a, (1981) provides that:

> The party in breach is, in any case, liable for the loss caused by his breach. If the benefit received by the injured party does not exceed that loss, he owes nothing to the party in breach. If the benefit received exceeds that loss, the rule stated in this Section generally gives the party in breach the right to recover the excess in restitution.

Thus the non-breaching party is unjustly enriched when the benefit received by the non-breaching party from the breaching party exceeds the loss incurred by the breach.

Over the course of the eleven years stipulated by the terms of the contract Plaintiff paid a total sum of $15,280 to Defendant. This amounts, on average, to a paid sum of $97.95 per month. Given that Jack Senini established a price term of $300 per month for purchase of the property, $97.95 is a reasonable approximation of a fair rental price term. Plaintiff lived in the property for the duration of the agreed-upon payment period specified by the installment contract for purchase of real property. In fact, Plaintiff continues to live in the property residence. (Dep. 1/12/2006, at 10, lines 16-17). It is not apparent that the benefit received by Defendant exceeds the loss simultaneously sustained by the Defendant (breach of contract for sale of property).

> **Plaintiff's interest in the property is no longer protected under Arizona statute and is thus eligible for forfeiture.**

A.R.S. § 33-742 provides that forfeiture of the interest of a purchaser in the property for failure to pay monies due under the contract may be enforced only after expiration of the following periods after the date such monies were due: If there has been paid thirty per cent, or more, but less than fifty per cent of the purchase price, one hundred and twenty days. *See* A.R.S. § 33-742.D.3. Alternatively, if there has been paid fifty per cent, or more, of the purchase price, nine months. *See* A.R.S. § 33-742.D.4. When the requisite time period provided by A.R.S. § 33-742 has expired, the non-breaching seller may elect to forfeit the purchaser's interest. *See Maciborski v. Chase Service Corp. of Arizona*, 161 Ariz. 557, 560 (App., 1989) (holding that plaintiff had forfeited interest in property as the statutorily defined period for retention of interest had expired).

The contract for the transfer of property from Defendant to Plaintiff called for full payment by December 31, 2002. Upon expiration of the payment period, Defendant had paid either 39% ($15,280/$39,600.00) or 57% ($15,280/$26,877.60) of the total sum due at the end of the pay period. Under A.R.S. § 33-742, Plaintiff's interest would be protected for either one hundred and twenty days or nine months after the termination of payment window, respectively. *See* A.R.S. § 33-742.D.3, *and* A.R.S. § 33-742.D.4. In either situation, Plaintiff's period for protection has long since expired. Given the expiration of the protection period mandated by A.R.S. § 33-742, Plaintiff's interest in the property is subject to forfeiture.

CONCLUSION

Summary judgment is appropriate here as Plaintiff has provided, by her own admission, the material price term by which she expected to pay on a monthly basis. Given this admission, there is no genuine issue of material fact that must be heard by a jury. Instead, this issue is a matter of law which may be resolved by the court. In light of admitted price term, it clear that Plaintiff is in material breach of the contract for transfer of real property from Defendant to Plaintiff. Due to the material breach, Plaintiff has no remaining enforceable right relating to this contract for transfer of property. Summary judgment should appropriately be entered in favor of the Defendant.

IT IS ORDERED granting summary judgment for Defendant.